(1) Supreme Court, U.S.
FILED
01 594 OCT - 9 2001
OFFICE OF THE CLERK

No. 01-

IN THE

Supreme Court of the United States

DEAD SEA BROMINE CO., LTD. and BROMINE COMPOUNDS LIMITED,

Petitioners,

v.

GERARDO DENNIS PATRICKSON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GEORGE W. BRANDT
LYONS, BRANDT, COOK & HIRAMATSU
1800 Davis Pacific Center
841 Bishop Street
Honolulu, Hawaii 96813
(808) 524-7030

PETER R. PADEN
Counsel of Record
PHILIP E. KARMEL
ROBINSON SILVERMAN PEARCE ARONSOHN & BERMAN LLP
1290 Avenue of the Americas
New York, New York 10104
(212) 541-1080

Attorneys for Petitioners

169813

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

162pp

QUESTION PRESENTED

The Foreign Sovereign Immunities Act (the "Act") establishes the ground rules for claims against a foreign state and, also, an "agency or instrumentality of a foreign state." 28 U.S.C. §§ 1330(a), 1603(a). The Act grants a foreign state or its agency or instrumentality the right to remove an action against it to federal court, immunity from suit absent an exception for certain types of claims and, in those cases where a lawsuit can be brought, certain substantive and procedural protections. *Id.* §§ 1330(a), 1441(d). The term "agency or instrumentality of a foreign state" is defined in pertinent part as "any entity . . . a majority of whose shares or other ownership interest is owned by a foreign state. . . ." *Id.* § 1603(b)(2). Because the State of Israel at all relevant times held a majority ownership interest in Petitioners Dead Sea Bromine Company Ltd. and Bromine Compounds Limited by owning virtually all of their parent corporation's stock, Petitioners assert that each of them is an "agency or instrumentality of a foreign state" pursuant to § 1603(b)(2) and that the district court therefore had subject matter jurisdiction under the Act.

The single question presented is whether the Act's definition of "agency or instrumentality" requires direct ownership by the foreign state, or whether an entity that is majority owned by the foreign state through one or more tiered subsidiaries is an entity "a majority of whose shares or other ownership interest is owned by a foreign state" within the meaning of 28 U.S.C. § 1603(b)(2).

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Dead Sea Bromine Company Ltd. and its wholly owned subsidiary, Bromine Compounds Limited, each of which was joined as a third-party defendant in this action. Dead Sea Bromine Company Ltd. is a wholly owned subsidiary of Israel Chemicals Limited, a corporation organized under the laws of Israel that has issued shares to the public. The majority shareholder of Israel Chemicals Limited is The Israel Corporation, which is organized under the laws of Israel and has also issued shares to the public.

The Respondents are the plaintiffs below:

Gerrardo Dennis Patrickson
Rodolfo Bermudez Arias
Benigno Torres Hernandez
Fernando Jimenez Arias
Santos Leandros
Herman Romero Aguilar
Elias Espinoza Merelo
Hooker Era Celestino
Alirio Manuel Mendez
Carlos Humberto Riveral

The defendants in this litigation, who are also Respondents, are:

Dole Food Company, Inc.
Dole Fresh Fruit Company
Dole Fresh Fruit International, Limited
Pineapple Growers Association of Hawaii
Amvac Chemical Corporation
Shell Oil Company
Dow Chemical Company

Occidental Chemical Corporation, individually and as successor to Occidental Chemical Company, Occidental Chemical Agricultural Products, Inc., Hooker Chemical and Plastics, Occidental Chemical Company of Texas and Best Fertilizer Company
Standard Fruit Company
Standard Fruit and Steamship Company
Standard Fruit Company De Costa Rica, S.A.
Standard Fruit Company De Honduras, S.A.
Chiquita Brands, Inc.
Chiquita Brands International, Inc.
United Brands Company, Inc., as successor to Chiquita Brands International, Inc.
Maritrop Trading Corporation
Del Monte Fresh Produce, N.A.
Del Monte Fresh Produce Hawaii, Inc.
Del Monte Fresh Produce Company
Fresh Del Monte N.V.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties and Corporate Disclosure Statement	ii
Table of Contents	iv
Table of Cited Authorities	vi
Table of Appendices	xiii
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	2
1. The Nature of the Case	2
2. Statutory Background	4
3. Statement of Facts	5
4. Proceedings in the District Court	7
5. Proceedings in the Court of Appeals	9
Reasons for Granting the Writ	11
1. The Question Presented Is Important and Arises Frequently.	11

	Page
2. The Ninth Circuit's Holding Creates a Direct Conflict With Decisions Of The Fifth and Seventh Circuits and Numerous Other Courts That Have Addressed The Same Question.	17
3. The Ninth Circuit's Holding Is Incorrect.	20
Conclusion	24

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

In re Air Crash Disaster Near Roselawn, Ind., 96 F.3d 932 (7th Cir. 1996) 12, 18, 19, 23

Alejandre v. AT&T, 42 F. Supp. 2d 1317 (S.D. Fla.), *rev'd on other grounds*, 183 F.3d 1277 (11th Cir. 1999) 13

Allendale Mutual Insurance Co. v. Bull Data Syst., Inc., 10 F.3d 425 (7th Cir. 1993) 15

America West Airlines, Inc. v. GPA Group, Ltd., 877 F.2d 793 (9th Cir. 1989) 16

Antoine v. Atlas Turner, Inc., 66 F.3d 105 (6th Cir. 1995) 15

Belgrade v. Sidex International Furniture Corp., 2 F. Supp. 2d 407 (S.D.N.Y. 1998) 8

Brown v. Valmet-Appleton, 77 F.3d 860 (5th Cir. 1996) 15

In re Chase & Sanborn Corp., 835 F.2d 1341 (11th Cir. 1988), *rev'd on other groundssub nom, Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) 8

In Re Clearsky Shipping Corp., 1999 WL 1021825 (E.D.La. Nov. 8, 1999) 13

Page

Delgado v. Shell Oil Co., 231 F.3d 165 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1603 (2001) 1, 3, 4, 12, 17, 18

Delgado v. Shell Oil Co., 890 F. Supp. 1315 (S.D. Tex. 1995), *aff'd*, 231 F.3d 165 (5th Cir. 2000) 8

In re Delta America Re Insurance Co., 900 F.2d 890 (6th Cir. 1990) 5

Dewhurst v. Telenor Invest AS, 83 F. Supp. 2d 577 (D.Md. 2000) 16

GE Capital Corp. v. Grossman, 991 F.2d 1376 (8th Cir. 1993) 5, 8

Gardiner Stone Hunter Int. v. Iberia Lineas Aereas de Espana, S.A., 896 F. Supp. 125 (S.D.N.Y. 1995) 16

Gates v. Victor Fine Foods, 54 F.3d 1457 (9th Cir. 1995) 10, 11, 22

Gilson v. Republic of Ireland, 682 F.2d 1022 (D.C. Cir. 1982), *on remand*, 606 F. Supp. 38 (D.D.C. 1984), *aff'd*, 787 F.2d 655 (D.C. Cir. 1986) 16, 19

Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445 (6th Cir. 1988) 8, 11, 15

Hyatt Corp. v. Stanton, 945 F. Supp. 675 (S.D.N.Y. 1996) 16

Page

J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315 (4th Cir. 1988) 15

Lehman Brothers Commercial Corp. v. Minmetals International Non-Ferrous Metals Trading Co., 2001 WL 423031 (S.D.N.Y. April 25, 2001) 12

Lopez del Valle v. Gobierno de la Capital, 855 F. Supp. 34 (D.P.R. 1994) 15

Lyon v. Agusta S.P.A., 252 F.3d 1078 (9th Cir. 2001) 16

Millicom International Cellular, S.A. v. Republic of Costa Rica, 995 F. Supp. 14 (D.D.C.1998) 13, 19

O'Connell Machinery Co., Inc. v. M.V. "Americana", 566 F. Supp. 1381 (S.D.N.Y. 1983), *aff'd*, 734 F.2d 115 (2d Cir.), *cert. denied*, 469 U.S. 1086 (198 ..... 14, 22

Outbound Maritime Corp. v. P.T. Indonesian Consortium, 582 F. Supp. 1136 (D.Md. 1984) 14

Papanos v. Lufthansa German Airlines, No. 94-2667-CIV (S.D.Fla. 1995) 8

Parex Bank v. Russian Savings Bank, 81 . . Supp. 2d 506 (S.D.N.Y. 2000) 12

Pere v. Nuovo Pignone, Inc., 150 F.3d 477 (5th Cir. 1998) 8

Page

Reiss v. Societe Centrale du Groupe des Assurances Nationales, 235 F.3d 738 (2d Cir.2000) 15, 19

Rodriguez v. Shell Oil Co., 932 F. Supp. 177 (S.D. Tex. 1996) 3

Ruggiero v. Compania Peruana De Vapores, 639 F.2d 872 (2nd Cir. 1981) 4, 17, 21

Rutkowski v. Occidental Chemical Corp., 1988 WL 107342 (N.D. Ill. 1988) 14

Southern Ocean Seafood Co. v. Holt Cargo Systems, Inc., 1997 U.S. Dist. LEXIS 12159(E.D. Pa. 1997) 16

Straub v. A.P. Green, Inc., 38 F.3d 448 (9th Cir. 1994) 16

Talbot v. Saipam A.G., 835 F. Supp. 352 (S.D. Tex. 1993) 13

Teledyne, Inc. v. Kone Corp., 892 F.2d 1404 (9th Cir. 1989) 16

Theo H. Davies & Co. v. Republic of the Marshall Islands, 174 F.3d 969 (9th Cir. 1999) 16

Trump Taj Mahal Associates v. Costruzioni Aeronautiche Giovanni Agusta S.P.A., 61F. Supp. 1143 (D.N.J. 1991), *aff'd*, 958 F.2d 365 (3d Cir.), *cert. denied*, 506 U.S. 826 (1992) 13, 14, 21

Page

USF&G Co. v. Braspetro Oil Services Co., 1999 WL 307666 (S.D.N.Y. 1999) 16

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) 4, 5

STATE CASES

Linton v. Airbus Industrie, 934 S.W.2d 754 (Ct. Appeals Houston [14th Dist.] 1996) 22

FEDERAL STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1330 1

28 U.S.C. § 1330(a) ..... i, 4

28 U.S.C. § 1332(a)(2) 1

28 U.S.C. § 1332(a)(4) 1

28 U.S.C. § 1391(f) 1

28 U.S.C. § 1441(d) ..... i, 1, 3, 4, 7

28 U.S.C. § 1603 23

28 U.S.C. § 1603(a) ..... i, 1, 3, 19

28 U.S.C. § 1603(b) 2, 4, 5, 18, 19

Cited Authorities

Page

28 U.S.C. § 1603(b)(2) ..... *passim*

28 U.S.C. § 1604 4

28 U.S.C. § 1605(a)(2) 4

LEGISLATIVE HISTORY

H.R. Rep. No. 94-1487, 94th Cong., 2nd Sess., *reprinted in* 5 U.S.C.C.A.N. 6604 (1976) 21

MISCELLANEOUS

Black's Law Dictionary (5th Ed. 1979) 20

Comment: *Litigating Claims Over Foreign Government-Owned Corporations under the Commercial Activities Exception to the Foreign Sovereign Immunities Act*, 20 J. INTL. L. BUS. 181 (Fall 1999) 19

Thad T. Dameris & Michael J. Mucchetti, *Vectors to Federal Court: Unique Approaches to Subject Matter Jurisdiction in Aviation Cases*, 62 J. AIR L. & COM. 959 (1997) 19, 20

John Fellas, *Tiering of Ownership Interests Under the FSIA*, N.Y.L.J., Apr. 8, 1997 20

Jane H. Griggs, *The Foreign Sovereign Immunities Act: Do Tiered Corporate Subsidiaries Constitute Foreign States?*, 20 W. New Eng. L. Rev. 387 (1998) 19

Cited Authorities

Page

Joseph W. Hardy, Jr., *Wipe Away the Tiers: Determining Agency or Instrumentality Status Under the Foreign Sovereign Immunities Act*, 31 Ga. L. Rev. 1121 (1997) 20

National Law Journal, Feb. 3, 1997 20

Kelly Shaul, *Tiered Entities and Sovereign Privileges Under the Foreign Sovereign Immunities Act*, 34 San Diego L. Rev. 1817 (Fall 1997) 20

The U.S. Foreign Sovereign Immunities Act, 648 PLI/Lit 191 (Feb. 2001) 20

Webster's Ninth New Collegiate Dictionary (10th Ed. 1999) 23

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Ninth Circuit Dated And Filed May 30, 2001 ..... 1a

Appendix B — Order Of The United States District Court For The District Of Hawaii Denying Dole Defendants' And Del Monte Defendants' Motions To Alter Or Amend Judgment Under Rule 59(e) Dated And Filed June 16, 1999 ..... 27a

Appendix C — Order Of The United States District Court For The District Of Hawaii Dismissing Action, Etc. Dated And Filed March 8, 1999 ... 34a

Appendix D — Order Of The United States District Court For The District Of Hawaii Denying Third Party Defendants Dead Sea Bromine Co., Ltd. And Bromine Compound Limited's Motion For Reconsideration Dated And Filed November 17, 1998 ..... 49a

Appendix E — Order Of The United States District Court For The District Of Hawaii Denying Plaintiffs' Motion For Remand, Etc. Dated And Filed September 9, 1998 ..... 55a

Appendix F — Order Of The United States Court Of Appeals For The Ninth Circuit Denying Petitions For Rehearing Dated And Filed July 10, 2001 ..... 120a

Dead Sea Bromine Company Ltd. ("Dead Sea Bromine") and Bromine Compounds Limited ("BCL") (collectively, the "Dead Sea Companies" or "Companies") petition for a writ of certiorari to review the judgment and opinion of the U.S. Court of Appeals for the Ninth Circuit. The court below held that the Companies are not agencies or instrumentalities of the State of Israel under the Foreign Sovereign Immunities Act, in direct conflict with the contrary holding of the U.S. Court of Appeals for the Fifth Circuit in *Delgado v. Shell Oil Co.*, 231 F.3d 165, 176 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1603 (2001).

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 251 F.3d 795 (9th Cir. 2001) and is in the Appendix at 1a (hereinafter "A.__"). The district court's principal opinion is at A.55a. It denied rehearing in an order at A.49a; dismissed the action for *forum non conveniens* in an order at A.34a; and denied rehearing of that order in an order at A.27a.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on May 30, 2001, and entered its order denying timely petitions for rehearing *en banc* on July 10, 2001. A.120a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Foreign Sovereign Immunities Act ("FSIA" or "Act") is codified at sections 1330, 1332(a)(2) & (4), 1391(f), 1441(d), 1602-11 of title 28, United States Code. It provides, among other things, that "[a]ny civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed" to federal court. 28 U.S.C. § 1441(d). Section 1603(a) of title 28, United States Code defines "foreign state" to include

any "agency or instrumentality of a foreign state," which is in turn defined as any entity:

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or *a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof*, and
>
> (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.

28 U.S.C. § 1603(b) (italics added). The question presented involves the language in italics.

STATEMENT OF THE CASE

1. The Nature of the Case

The plaintiffs are citizens and residents of Costa Rica, Ecuador, Guatemala and Panama who claim to have worked on banana farms in those countries and, during the course of such employment, to have suffered personal injury from exposure to dibromochloropropane (DBCP), a pesticide formerly used on banana trees.

The plaintiffs filed this putative class action on October 3, 1997 in the Circuit Court of the First Circuit of the State of Hawaii seeking monetary damages and injunctive relief. The named defendants are alleged manufacturers of DBCP (such as Shell Oil and Dow Chemical) and alleged operators of the foreign banana farms (such as Dole, Chiquita and Del Monte).

Defendant Dole Food Company, Inc. impleaded the Dead Sea Companies, alleging that they manufactured and sold DBCP to one or more defendants. The Dead Sea Companies thereafter removed the action to the U.S. District Court for the District of Hawaii. The removal was based on 28 U.S.C. § 1441(d), which provides that any foreign state may remove claims asserted against it to federal court. The FSIA defines "foreign state" to include an "agency or instrumentality of a foreign state," 28 U.S.C. § 1603(a), which is, in turn, defined in pertinent part as "any entity . . . a majority of whose shares or other ownership interest is owned by a foreign state. . . ." *Id.* § 1603(b)(2). The Dead Sea Companies contend that they are agencies or instrumentalities under the Act because at all relevant times the State of Israel owned a majority of their shares through a tiered ownership structure.

This is not the first case in which the Dead Sea Companies' status under the FSIA has been presented. It happened before in a series of lawsuits brought in Texas state courts against the same principal defendants as in this case by thousands of individuals who alleged that they too had labored on banana farms in Central America and other regions of the globe and had thereby suffered injuries from exposure to DBCP. In those cases, one or more of the defendants impleaded one or both of the Dead Sea Companies, which thereupon removed the cases to federal court. Ruling on plaintiffs' motion to remand several of those actions, which had been consolidated in the U.S. District Court for the Southern District of Texas, Judge Sim Lake upheld the Dead Sea Companies' claim to being agencies or instrumentalities of the State of Israel under this provision of the FSIA. *See Delgado v. Shell Oil Co.*, 890 F. Supp. 1315, 1318-19, 1340 n.33 (S.D. Tex. 1994); *Rodriguez v. Shell Oil Co.*, 932 F. Supp. 177, 180 n.6 (S.D. Tex. 1996). The U.S. Court of Appeals for the Fifth Circuit expressly affirmed Judge Lake's FSIA rulings in *Delgado v. Shell Oil Co.*, 231 F.3d 165, 176 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1603 (2001).

In its ruling below, the court of appeals rejected the analysis and holding of *Delgado v. Shell Oil Co.* and held that the Dead Sea Companies are not agencies or instrumentalities under the FSIA. Thus, the Ninth and Fifth Circuits – ruling in functionally identical DBCP litigations – have reached the opposite conclusion as to whether the Dead Sea Companies are agencies or instrumentalities under the FSIA and, hence, whether there is federal jurisdiction over the lawsuits.

2. Statutory Background

Congress enacted the FSIA in 1976 to establish uniform "standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies or instrumentalities." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). The entities to be accorded foreign sovereign status under the Act are broadly defined to include the foreign sovereign and its political subdivisions, agencies, and instrumentalities. 28 U.S.C. § 1603(b); *Ruggiero v. Compania Peruana De Vapores*, 639 F.2d 872, 878 (2d Cir. 1981).

The Act provides that all such foreign sovereign entities shall be immune from the jurisdiction of courts in the United States, subject to certain exceptions. 28 U.S.C. § 1604. In fact, the exceptions describe a fairly wide range of cases in which foreign states and their agencies and instrumentalities may be sued, as, for example, where the claims arise out of commercial activities conducted or having a direct effect in the United States. *Id.* § 1605(a)(2). Where such suits may be maintained, the Act accords certain protections to the foreign sovereign entities. Among other things, they are entitled to federal court jurisdiction and a non-jury trial. *Id.* §§ 1330(a), 1441(d).

The provision of a federal forum for such suits is designed to protect the "foreign relations of the United States," *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. at 493; to reduce the potential for conflicting results, *id.* at 497; and to "avoid any local bias . . . inherent in state court proceedings." *In re Delta America Re Ins. Co.*, 900 F.2d 890, 893 (6th Cir. 1990). Such suits may raise "foreign policy concerns" to the extent they require a court in this country to "judg[e] the acts of another nation" regarding allegations that it, or its agencies or instrumentalities, committed a tort, breached a contract, or otherwise committed a legal wrong. *GE Capital Corp. v. Grossman*, 991 F.2d 1376, 1381 (8th Cir. 1993). All of these concerns are implicated in a judicial interpretation of the reach of the Act's definition of "agency or instrumentality" of a foreign state.

3. Statement of Facts

It is undisputed that the Dead Sea Companies meet the requirements of subparts (1) and (3) of 28 U.S.C. § 1603(b): they are separate corporations organized under the laws of the State of Israel, and their principal place of business is Beer Sheva, Israel. The dispute presented to the district court and reviewed on appeal centered upon whether the Companies satisfy either of the disjunctive, alternative requirements of § 1603(b)(2). Thus, the lower courts were asked to determine whether during the relevant period the State of Israel had a majority ownership interest in the Companies *or* whether the Companies were organs of the State within the meaning of the FSIA. Since the majority ownership prong of § 1603(b)(2) is the issue presented here, the discussion below focuses on the facts pertinent to that issue.

The State of Israel created Dead Sea Bromine in 1955 to develop and market the State-owned mineral resources of the Dead Sea, a saline lake located between Israel and Jordan. These minerals, which include bromine, potassium and magnesium,

are among Israel's principal (among relatively few) natural resources. SER738.[1] Dead Sea Bromine's subsidiary, BCL, formulates the bromine extracted by its parent into bromine-based compounds that have a wide variety of industrial, commercial and agricultural uses. SER738-39. During the relevant time period, the Companies were subsidiaries of a corporation owned by the State of Israel, and, consequently, the Companies were, like their parent corporation, subject to Israel's Government Companies Law, which provided the State with authority to control and direct their affairs. SER744. The State exercised that authority on many occasions. SER855-1183.

The record establishes that the State of Israel held a substantial majority ownership interest in Dead Sea Bromine throughout the period 1968-95. (For purposes of the FSIA analysis, this time period is over-inclusive, in view of plaintiffs' allegation – in paragraph 24 of their Complaint – that they could not have been exposed to DBCP manufactured or distributed by the Companies prior to 1975. SER10.) For example, from 1968-75, the State held a 99% ownership interest in Dead Sea Bromine. During this period, the State owned 99% of the shares of Dead Sea Works Ltd. ("Dead Sea Works"), an Israeli corporation whose principal offices are in Beer Sheva, Israel. Dead Sea Works owned virtually all shares of Dead Sea Bromine (99.9% of its shares), except for a single share owned directly by the State. SER740, SER749-50, SER754.

---

1. This Petition cites to the Supplemental Excerpts of Record that Petitioners filed with the court of appeals as "SER__." The record on the FSIA issue consists of declarations and exhibits that the Dead Sea Companies submitted to the district court in opposition to plaintiffs' motion to remand. Plaintiffs neither challenged the admissibility of the Companies' submissions nor presented any additional evidence pertinent to the FSIA issue. No party requested that the district court hold an evidentiary hearing and no hearing was held. The district court thus made its rulings on a paper record that the court of appeals reviewed below.

The State restructured its holdings in 1975 but retained a 98% ownership interest in Dead Sea Bromine. In that year, the State transferred most of its shares in Dead Sea Works to Israel Chemicals Ltd. ("ICL"), an Israeli corporation then owned entirely by the State of Israel. ICL thereafter owned approximately 98% of the shares of Dead Sea Works, which continued to own 99.9% of the shares of Dead Sea Bromine. The State continued to directly own the one other share of Dead Sea Bromine. SER740-41, SER750, SER752, SER754.

Although the percentages of its ownership interest fluctuated in the ensuing years,[2] the State of Israel continued to maintain its majority ownership interest in Dead Sea Bromine, through its ownership of virtually all the shares of ICL and ICL's ownership of varying majority interests of Dead Sea Works, until 1995, when the State's interest in ICL, and hence, its subsidiaries, fell below 50%.

The State also held a majority ownership interest in BCL (Dead Sea Bromine's subsidiary). The facts pertinent to BCL are similar in character to those for Dead Sea Bromine, *see* SER740, SER754-55, SER760-62, but they need not be recited because the question presented may be addressed by analyzing Dead Sea Bromine's status alone. If it is an agency or instrumentality under the Act, the court below erred in dismissing the action for lack of subject matter jurisdiction.

4. Proceedings in the District Court

After plaintiffs filed this action in state court in Hawaii, defendant Dole Food Company, Inc. filed a third-party complaint against the Dead Sea Companies, and they removed the action under the FSIA. *See* 28 U.S.C. § 1441(d). The defendants

---

2. Further details concerning the State's ownership position in Dead Sea Bromine are set forth in the record at SER740-41, SER750, SER752, SER754.

thereafter filed a Supplemental Notice of Removal based upon the foreign relations concerns raised by the complaint. Plaintiffs moved to remand the action for lack of subject matter jurisdiction in the federal court. The defendants moved to dismiss for *forum non conveniens*.

The issue in controversy before the district court on the Dead Sea Companies' removal was whether the Companies were "an organ of a foreign state or political subdivision thereof" or an entity "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." *Id.* § 1603(b)(2). The Dead Sea Companies claimed that they met both requirements, either one of which would be sufficient to satisfy § 1603(b)(2).

On September 9, 1998, the district court held that the Dead Sea Companies were not agencies or instrumentalities of Israel. A.55a. The court agreed with the Companies' position – which every other court that has reached the issue has also endorsed[3] – that an entity is covered by the FSIA if it was an agency or instrumentality of a foreign state during the time of the alleged conduct that gave rise to the claims for relief asserted against it. A.62a-64a. Nevertheless, the court held that during this relevant time period, the Dead Sea Companies were neither majority owned nor an organ of the State of Israel. As to the "majority . . . ownership interest" prong of § 1603(b)(2), the court found that, although the State of Israel held an indirect

---

3. *See Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 480-81 (5th Cir. 1998); *GE Capital Corp. v. Grossman*, 991 F.2d 1376, 1380-82 (8th Cir. 1993); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 449-50 (6th Cir. 1988); *In re Chase & Sanborn Corp.*, 835 F.2d 1341, 1347 (11th Cir. 1988), *rev'd on other grounds sub nom. Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *Belgrade v. Sidex International Furniture Corp.*, 2 F. Supp.2d 407, 412-14 (S.D.N.Y. 1998); *Delgado v. Shell Oil Co.*, 890 F. Supp. at 1340 n.33, *aff'd*, 231 F.3d 165 (5th Cir. 2000); *Papanos v. Lufthansa German Airlines*, No. 94-2667-CIV, slip op. at 7 (S.D.Fla. 1995).

majority ownership interest in the Companies, such an interest was insufficient under the Act. A.71a. As to the "organ" prong of § 1603(b)(2), the court held that neither of the Dead Sea Companies was an organ because they were "not controlled entirely by government appointees, do not employ only public servants, . . . [and] are not entirely owned by the State of Israel." A.76a.

In the same decision, the district court held that it had federal question jurisdiction because of foreign relations concerns and held that it would conditionally dismiss the action under the doctrine of *forum non conveniens*. A.83a.

On November 17, 1998, the district court denied reconsideration of its opinion. A.49a. On March 8, 1999, the district court dismissed the action for *forum non conveniens*. A.34a. On June 16, 1999, the court denied plaintiffs' motion for reconsideration. A.27a . Plaintiffs' notice of appeal and the Dead Sea Companies' notice of cross-appeal followed.

5. Proceedings in the Court of Appeals

In their appeal, plaintiffs argued that the district court did not have subject matter jurisdiction and, in any event, should not have dismissed the action for *forum non conveniens*. In their cross-appeal, the Dead Sea Companies argued that the district court erred in holding that they were not agencies or instrumentalities under the Act.

The court of appeals heard argument on August 9, 2000 and rendered its decision on May 30, 2001. The court held that the district court had neither federal-question nor FSIA jurisdiction and ordered that the action be remanded to state court, without reaching the *forum non conveniens* issue.

The Ninth Circuit's ruling on the FSIA issue rested principally on its prior decision in *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1462 (9th Cir. 1995) ("*Gates*"). In *Gates*, the Ninth Circuit had rejected the contention that any corporation owned by an "organ" of a foreign state was itself an "agency or instrumentality" under the FSIA. The Dead Sea Companies argued that their corporate structure was materially different than the one reviewed in *Gates* because the Companies' ultimate parent entity – unlike the "organ" in *Gates* – was owned by a foreign state and, thus, a foreign state owned "a majority of [their] shares or other ownership interest." (By contrast, in *Gates*, the foreign state had no ownership interest in the parent "organ" that owned the subsidiary claiming FSIA status.) In its ruling below, however, the court of appeals rejected the Companies' argument and read *Gates* "as limiting an instrumentality to the first tier of ownership: those entities owned directly by the foreign state itself. . . . [*Gates*] held that a corporation wholly owned by an instrumentality of a foreign government is not a foreign instrumentality under the Act." A.22a.

Although it placed principal reliance on and felt bound by its decision in *Gates*, the court of appeals did address the Companies' contention that the phrase "other ownership interest" in § 1603(b)(2) is sufficiently broad to encompass the majority ownership interest that the State of Israel held in the Companies. A.22a-23a. The court rejected the Companies' argument on the ground that construing "other ownership interest" in that way would, in its view, render the reference to "shares" in § 1603(b)(2) superfluous. A.23a.

The court of appeals forthrightly acknowledged that its interpretation of the FSIA conflicted with that of other circuit courts:

> The [Dead Sea] Companies point out that several other circuits have disagreed with *Gates* and

> held that subsidiaries of a corporation owned by a foreign state are in fact instrumentalities under the FSIA. *See, e.g., Delgado v. Shell Oil Co.*, 231 F.3d 165, 176 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1603 (2001); *In re Air Crash Disaster Near Roselawn, Ind.*, 96 F.3d 932, 941 (7th Cir. 1996); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 448-50 (6th Cir. 1988). They argue, not implausibly, that federal courts should not care how a foreign government structures its ownership interests so long as it, in fact, owns a majority interest in a particular corporation. But none of this matters, because *Gates* decided this question, and we are bound by its authority.

A.23a-24a (citation to *Gould* modified to full citation). The court of appeals thus alluded to the strength of the Companies' arguments, and to the authority upon which they rested, but held that *Gates* precluded it from considering the issue anew.

REASONS FOR GRANTING THE WRIT

1. The Question Presented Is Important and Arises Frequently.

The question presented – whether a subsidiary of a company owned by a foreign state may itself claim to be an agency or instrumentality of the foreign state under the FSIA, and, hence, whether the federal courts have jurisdiction over a lawsuit brought against such an entity – is one that has arisen repeatedly and no doubt will continue to be the source of much litigation and dispute until the law is settled by this Court. Until that time, the uniformity of law pertaining to suits against foreign sovereigns and related entities that the FSIA was designed to achieve will not exist. Like the Dead Sea Companies in this case, many enterprises owned and controlled by foreign states,

engaged in a broad range of commercial activities in and affecting the United States, will – or will not – be entitled to the protections of the FSIA depending on the particular circuit in which claims are asserted against them.

Numerous courts have confronted and rejected the argument that tiering is not acceptable under the Act, holding that a subsidiary of an entity owned by a foreign state is entitled to "agency or instrumentality" status because such an ownership structure meets the "majority ownership" requirement of 28 U.S.C. § 1603(b)(2):

- *Delgado v. Shell Oil Co.*, 231 F.3d 165, 176 (5th Cir. 2000) (holding Dead Sea Companies agencies or instrumentalities of the State of Israel because "indirect or tiered majority ownership is sufficient to qualify an entity as a foreign state");

- *In re Air Crash Disaster Near Roselawn, Indiana*, 96 F.3d 932, 935-41 (7th Cir. 1996) (holding a French aircraft manufacturing corporation to be an "agency or instrumentality" where the French and Italian governments held a majority ownership interest in the corporation through tiered subsidiaries) ("*Air Crash*");

- *Lehman Brothers Commercial Corp. v. Minmetals International Non-Ferrous Metals Trading Co.*, 2001 WL 423031, *2-4 (S.D.N.Y. April 25, 2001) (holding that FSIA applied to a metals trading company that is a subsidiary of a trading conglomerate that is a subsidiary of a holding corporation owned by the People's Republic of China);

- *Parex Bank v. Russian Savings Bank*, 81 F. Supp.2d 506, 508 (S.D.N.Y. 2000) (holding that FSIA applied to a Russian bank over 60% of whose shares were

owned by the Russian Central Bank, which is owned by the Russian Government);

- *In Re Clearsky Shipping Corp.*, 1999 WL 1021825 (E.D.La. Nov. 8, 1999) (holding that FSIA applied to a telecommunications company a majority of whose shares were owned by corporations owned by the Cuban government);

- *Alejandre v. AT&T*, 42 F. Supp.2d 1317, 1336 (S.D. Fla.) (holding that FSIA applied to a telecommunications company a majority of whose shares were owned by corporations owned by the Cuban government), *rev'd on other grounds*, 183 F.3d 1277 (11th Cir. 1999);

- *Millicom International Cellular, S.A. v. Republic of Costa Rica*, 995 F. Supp. 14, 18 n.5 (D.D.C. 1998) (holding that a telecommunications and data transmission service provider was an "agency or instrumentality" of Costa Rica because it was a subsidiary of the State-owned telecommunications monopoly);

- *Talbot v. Saipam A.G.*, 835 F. Supp. 352, 353 n.2 (S.D. Tex. 1993) (holding that a vessel-owning corporation was an "agency or instrumentality" of Italy where the Italian government owned most of the shares in two corporations that collectively owned 81.05% of the vessel-owning corporation's shares);

- *Trump Taj Mahal Associates v. Costruzioni Aeronautiche Giovanni Agusta S.P.A.*, 761 F. Supp. 1143, 1149 (D.N.J. 1991) (holding that a helicopter manufacturing corporation was an "agency or instrumentality" where the Italian government owned

shares in a holding company that owned shares of another holding company that owned 98.9% of the shares of the helicopter manufacturing corporation), *aff'd*, 958 F.2d 365 (3d Cir.), *cert. denied*, 506 U.S. 826 (1992);

- *Rutkowski v. Occidental Chemical Corp.*, 1988 WL 107342 (N.D. Ill. 1988) (holding that a tiered subsidiary of the province of Quebec was an "agency or instrumentality" because of the Act's focus on substance rather than corporate form);

- *Outbound Maritime Corp. v. P.T. Indonesian Consortium*, 582 F. Supp. 1136, 1143-45 (D.Md. 1984) (holding a joint venture, a majority of which was owned by a corporation wholly owned by Indonesia, was an "agency or instrumentality"); and

- *O'Connell Machinery Co., Inc. v. M.V. "Americana"*, 566 F. Supp. 1381 (S.D.N.Y. 1983) (holding that a shipping entity was an "agency or instrumentality" of the Italian government where a holding company owned by the government, through a subsidiary or subdivision, owned a majority of its shares), *aff'd*, 734 F.2d 115 (2d Cir.), *cert. denied*, 469 U.S. 1086 (1984).

The Ninth Circuit's decision conflicts with the holding of each of the foregoing cases. It is also in conflict with the decisions of numerous other courts that have been presented with similar fact patterns and stated, or assumed without extended discussion, that a subsidiary corporation is an "agency or instrumentality" under the FSIA. These cases all accepted tiered subsidiaries as agencies or instrumentalities under the Act and illustrate further the frequency with which the "subsidiary" issue arises:

- *Reiss v. Societe Centrale du Groupe des Assurances Nationales*, 235 F.3d 738, 746 (2d Cir. 2000) ("agency or instrumentality" status given to second tier subsidiary of Republic of France);

- *Brown v. Valmet-Appleton*, 77 F.3d 860, 862-63 (5th Cir. 1996) ("agency or instrumentality" status given to a paper machinery corporation that was wholly owned by a corporation that was 70% owned by the Republic of Finland);

- *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 107, 109 (6th Cir. 1995) ("agency or instrumentality" status given to subsidiary of a corporation owned by Canadian government);

- *Lopez del Valle v. Gobierno de la Capital*, 855 F. Supp. 34, 35-36 (D.P.R. 1994) ("agency or instrumentality" status given to entity indirectly owned by Venezuelan government through a holding company);

- *Allendale Mut. Ins. Co. v. Bull Data Syst., Inc.*, 10 F.3d 425, 426-27 (7th Cir. 1993) ("agency or instrumentality" status given to two corporations owned by an entity 90% of which was owned by the Republic of France);

- *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 317 (4th Cir. 1988) ("agency or instrumentality" status given to four corporations owned by a company that was in turn owned by the Republic of France);

- *Gould Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 448-50 (6th Cir. 1988) ("agency or instrumentality" status given to subsidiary of a French corporation, majority owned by the Republic of France); and

- *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1026 (D.C. Cir. 1982), *on remand*, 606 F. Supp. 38 (D.D.C. 1984), *aff'd*, 787 F.2d 655 (D.C. Cir. 1986) ("agency or instrumentality" status given to subsidiary of corporation owned by Republic of Ireland).[4]

Finally, following the Ninth Circuit's decision in *Gates*, several district courts confronted with a subsidiary of an entity owned by a foreign state have held, like the Ninth Circuit below, that a tiered ownership structure does not satisfy the Act's definition of "agency or instrumentality." *See Dewhurst v. Telenor Invest AS*, 83 F. Supp.2d 577 (D.Md. 2000); *USF&G Co. v. Braspetro Oil Services Co.*, 1999 WL 307666 (S.D.N.Y. 1999); *Southern Ocean Seafood Co. v. Holt Cargo Systems, Inc.*, 1997 U.S. Dist. Lexis 12159 (E.D. Pa. 1997); *Hyatt Corp. v. Stanton*, 945 F. Supp. 675 (S.D.N.Y. 1996); *Gardiner Stone Hunter Int. v. Iberia Lineas Aereas de Espana, S.A.*, 896 F. Supp. 125, 130 (S.D.N.Y. 1995).

---

4. One could add to this list Ninth Circuit cases in which that circuit court accepted tiered subsidiaries as agencies or instrumentalities under the Act. Although these cases no longer state the law in the Ninth Circuit, they further illustrate the frequency with which the tiering issue has arisen. *See Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1081 (9th Cir. 2001) ("agency or instrumentality" status assumed for airplane manufacturing corporation owned by four aerospace corporations owned by the Republic of Italy); *Theo H. Davies & Co. v. Republic of the Marshall Islands*, 174 F.3d 969, 971-73 (9th Cir. 1999) ("agency or instrumentality" status given to second tier subsidiary of the Republic of Marshall Islands); *Straub v. A.P. Green, Inc.*, 38 F.3d 448, 451 (9th Cir. 1994) ("agency or instrumentality" status given to second tier subsidiary of the province of Quebec); *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404, 1406-7, 1411-12 (9th Cir. 1989) ("agency or instrumentality" status given to subsidiary of a corporation 81% of whose shares were owned by Republic of Finland); *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 795 n.2, 796-800 (9th Cir. 1989) ("agency or instrumentality" status given to wholly owned subsidiary of Aer Lingus, a corporation owned by the Republic of Ireland).

Not only does the "subsidiary" issue arise frequently, it is important since the FSIA is one of the basic statutes granting the federal courts subject matter jurisdiction over civil actions. *See Ruggiero v. Compania Peruana De Vapores*, 639 F.2d at 875-78. The issue is often critical, since, as in the instant case, it may determine whether the action should be resolved in federal or state court. Continued litigation in the lower courts will not move the issue to final resolution. Moreover, the confusion that currently exists in the case law jeopardizes the important foreign policy and foreign relations concerns that gave rise to the FSIA. *See supra* at 4-5. At present, numerous significant enterprises closely connected to foreign sovereign states confront a major uncertainty as to whether they enjoy the protections of the Act for claims asserted against them in the United States. Since the issue arises frequently and is important, it is worthy of this Court's review.

2. The Ninth Circuit's Holding Creates a Direct Conflict With Decisions Of The Fifth and Seventh Circuits and Numerous Other Courts That Have Addressed The Same Question.

The decision below directly conflicts with the Fifth Circuit's decision that the Dead Sea Companies are agencies or instrumentalities of the State of Israel under the FSIA. *See Delgado v. Shell Oil Co.*, *supra*. The court of appeals acknowledged the conflict in its opinion. A.23. The issue in *Delgado*, like that in this case, focused on the language of § 1603(b)(2). The Fifth Circuit, noting Israel's undisputed majority ownership of the Dead Sea Companies through its direct ownership of their ultimate parent corporation, held that the Companies were "agencies or instrumentalities" under the Act, on the ground that:

> The plain language of the statute simply requires "ownership" by a foreign state. It draws no

> distinction between direct and indirect ownership; neither does it expressly impose a requirement of direct ownership.

231 F.3d at 176. By contrast, the court of appeals below squarely held that § 1603(b)(2) "does not include the indirect ownership of shares. . . ." A.23a. That two Circuits interpreting the identical statutory provision in functionally identical lawsuits have reached opposite conclusions whether the protections of the FSIA apply to the Dead Sea Companies creates a clean legal issue ideally suited for this Court's review, since the facts relating to the State's majority ownership of the Companies through a tiered subsidiary structure are undisputed and, in any event, established by the record.

The Ninth Circuit's interpretation of the FSIA also conflicts with the Seventh Circuit's holding and extensive analysis of the subsidiary issue in *Air Crash*, which the court of appeals also acknowledged in its opinion below. A.23a. Although the end result of the holding in *Air Crash* is the same as in *Delgado*, the statutory exegesis took a different route. In *Air Crash*, the Seventh Circuit focused on the interrelationship between § 1603(a) (defining "foreign state" as including an "agency or instrumentality") and § 1603(b) (defining "agency or instrumentality"), and concluded that the two sections should be interpreted recursively. *See* 96 F.3d at 941. This "recursive" interpretation provides an analytically distinct rationale for the conclusion that both of the Dead Sea Companies are "agencies or instrumentalities."

The *Air Crash* analysis starts with the first-tier of ownership and proceeds from there. To illustrate, consider ICL (Dead Sea Bromine's grandparent), which, under any interpretation of the Act, would be an "agency or instrumentality" under § 1603(b) because the State directly owned 100% of its shares. Under the reasoning of *Air Crash*, ICL is, therefore, a "foreign state"

pursuant to § 1603(a), since a "foreign state" is defined as including any "agency or instrumentality." Dead Sea Works (Dead Sea Bromine's parent, whose shares were owned by ICL), by virtue of being directly owned by ICL (a "foreign state" under § 1603(a)) would also be an "agency or instrumentality" pursuant to § 1603(b) and, therefore, a "foreign state" pursuant to § 1603(a). For the same reason, Dead Sea Bromine and BCL would also be directly owned by a "foreign state" and be an "agency or instrumentality" under the Act. *See Air Crash*, 96 F.3d at 939-41; *Millicom International Cellular, S.A. v. Republic of Costa Rica*, 995 F. Supp. at 18.

The Ninth Circuit is the only circuit court of appeals to have rejected tiered ownership under § 1603(b)(2). Although the Fifth and Seventh Circuits are the only other circuit courts to have analyzed the issue at any length, the Ninth Circuit's interpretation is also in conflict with the many other decisions cited *supra* at 12-16, including those of the D.C., Second, Fourth and Sixth Circuits in *Gilson*, *Reiss*, *J.J. Ryan & Sons, Inc.*, and *Gould Inc.*, respectively, all of which endorsed or accepted majority-owned subsidiary entities as falling within the purview of the Act.

Thus, this Court's answer to the question of how subsidiary corporations should be treated under the Act would resolve a stark conflict among the circuits, and numerous lower courts, concerning a pivotal and frequently presented jurisdictional issue. The issue has been addressed as well by numerous law review commentators, who are also at odds as to the status of subsidiaries under the Act.[5] A quarter of a century after the FSIA's

5. *See* Comment: *Litigating Claims Over Foreign Government-Owned Corporations under the Commercial Activities Exception to the Foreign Sovereign Immunities Act*, 20 J. INTL. L. BUS. 181 (Fall 1999); Jane H. Griggs, *The Foreign Sovereign Immunities Act: Do Tiered Corporate Subsidiaries Constitute Foreign States?*, 20 W. NEW ENG. L. REV. 387 (1998); Thad T. Dameris & Michael J. Mucchetti, *Vectors to*

(Cont'd)

enactment in 1976, the subsidiary issue has been fully analyzed by the lower courts and legal scholars and is now ripe for review by this Court.

3. The Ninth Circuit's Holding Is Incorrect.

Quite apart from being inconsistent with the case law of other circuits, the court of appeals decision below is not consistent with the language, structure or history of the Act. Its erroneous decision should be vacated and reversed.

Although the district court's undisputed finding below was that the State of Israel had "*indirect ownership* of [the] Dead Sea [Companies]" through its direct ownership of their parent corporation, A.65a (emphasis added), the court of appeals (like the district court) held that such an ownership interest does not meet the requirements of the Act. Yet the plain language of § 1603(b)(2) ("a majority of whose shares or other ownership interest is owned by a foreign state") makes no reference to any requirement that the "ownership interest" be "direct." That section requires only that the foreign state have a "majority . . . ownership interest" in the entity. The word "interest" is the "most general term that can be employed to denote a right, claim, title, or legal share in something." *Black's Law Dictionary* at 729 (5th Ed. 1979). "More particularly it means a right to have the advantage accruing from anything; any right in the nature of property, but less than title." *Id.* Thus, the fact that the State of

---

(Cont'd)

Federal Court: Unique Approaches to Subject Matter Jurisdiction in Aviation Cases, 62 J. Air L. & Com. 959 (1997); Joseph W. Hardy, Jr., *Wipe Away the Tiers: Determining Agency or Instrumentality Status Under the Foreign Sovereign Immunities Act*, 31 Ga. L. Rev. 1121 (1997); Kelly Shaw, *Tiered Entities and Sovereign Privileges Under the Foreign Sovereign Immunities Act*, 34 San Diego L. Rev. 1817 (Fall 1997); John Fellas, *Tiering of Ownership Interests Under the FSIA*, N.Y.L.J., Apr. 8, 1997, at 1; *see also The U.S. Foreign Sovereign Immunities Act*, 648 PLI/Lit 191 (Feb. 2001); National Law Journal, Feb. 3, 1997, at B7.

Israel did not have title to the shares of the Dead Sea Companies is irrelevant: the State held a majority ownership "interest" in the companies by owning their parent company. This ownership gave the State the right to receive the profits generated by the Dead Sea Companies; to approve their capital structure or any decision to privatize them; to appoint their management; to approve the appointment of their directors, legal advisors and accountants; to approve their budgets and business plans; and to control their affairs in numerous other respects. SER855-1183. Clearly, the State held a controlling, majority ownership "interest" in the Companies. *See Trump Taj Mahal Associates v. Costruzioni Aeronautiche Giovanni Agusta S.p.A.*, 761 F. Supp. at 1150 (foreign state has a majority "ownership interest" in a subsidiary of a state-owned corporation).

The Act's legislative history is in accord with the interpretation urged here by the Companies. The key House Report (H.R. Rep. No. 94-1487, 94th Cong., 2nd Sess., *reprinted in* 5 U.S.C.C.A.N. 6604 (1976)) makes plain that Congress intended to cast the agency or instrumentality net broadly. *See Ruggiero v. Compania Peruana De Vapores*, 639 F.2d at 873-75. The Act was crafted to cover a myriad of governmental, social and economic systems. The Report notes the widely varying types of enterprises that Congress had in mind (including trading enterprises, shipping lines, airlines, steel companies, and mining enterprises) and reflects its understanding that these entities would be engaged in commercial activities for profit. H.R. Rep. No. 94-1487 at 16. If one thing is clear from the numerous cases cited above, it is that sovereign states commonly employ a tiered corporate structure to engage in and manage such enterprises. It would fundamentally undermine Congressional intent to narrow the application of the FSIA by reading into it the restrictive interpretation adopted by the Ninth Circuit.

The Congressional policy concerns underlying the FSIA are in no way diminished by the fact that the foreign sovereign has chosen to hold and control its entities through a tiered corporate ownership structure. As one court has observed, the "FSIA specifically provides that 'corporate form' – in and of itself – be immaterial." *O'Connell Machinery Co., Inc. v. M.V. "Americana"*, 566 F. Supp. 1381, 1385 (S.D.N.Y. 1983), *aff'd*, 734 F.2d 115, 116 (2d Cir. 1984). The foreign sovereign's internal, administrative decision as to how its ownership interest is held or structured under its form of government and its legal and economic systems is immaterial to the purposes and objectives of the statute.

The Ninth Circuit did not articulate any policy rationale as to why a company that is 100% owned by a foreign state should be entitled to remove a case to federal court but a wholly owned subsidiary of that company should not be so entitled. The plain language of the FSIA makes both companies an "agency or instrumentality" of the foreign state if the state holds a majority ownership interest in the companies. Indeed, under the Ninth Circuit's approach, a company that is 51% owned by a foreign state would be entitled to the Act's protections, but a second tier subsidiary in which the state had a 100% interest would not. Because there is "no policy reason why tiering through an intermediary majority owned by a foreign state should not be permitted under the FSIA," *Linton v. Airbus Industrie*, 934 S.W.2d 754, 762 (Ct. Appeals Houston [14th Dist.] 1996), there is no reason to depart from the plain language of the statute, which requires only that a foreign state have a majority "ownership interest" for the FSIA to apply.

Although the Ninth Circuit below relied principally on a broad interpretation of its prior decision in *Gates*, it also opined that the Dead Sea Companies' interpretation of "other ownership interest" was not persuasive because it would swallow and make superfluous the reference in § 1603(b)(2) to "shares." A.23a. The Ninth Circuit's argument is not logical. The word "other,"

in this context, means "different." *Webster's Ninth New Collegiate Dictionary* at 835 (illustrating this meaning with the sentence "any other color would have been better"). A plain language interpretation of "other ownership interest" does not render the reference to "shares" superfluous because shares are not included in that which is referred to by "*other* ownership interest."

Finally, apart from all of these arguments, the Seventh Circuit's "recursive" interpretation of the Act in *Air Crash*, *see supra* at 18-19, provides an entirely different rationale for rejecting the Ninth Circuit's interpretation. The Seventh Circuit's interpretation of the Act is consistent with, and indeed compelled by, the plain language of § 1603, and should be endorsed by this Court.

CONCLUSION

The petition should be granted so that the Court may answer the question presented. The issue arises frequently. It has given rise to conflicting holdings by several of the circuit courts and by numerous district courts. It has been analyzed by the law reviews. It involves the subject matter jurisdiction of the federal courts under the Foreign Sovereign Immunities Act of 1976 and is therefore important. It is squarely presented in this case and is worthy of this Court's review.

Dated: New York, New York
October 5, 2001

Respectfully submitted,

PETER R. PADEN
Counsel of Record
PHILIP E. KARMEL
ROBINSON SILVERMAN PEARCE
ARONSOHN & BERMAN LLP
1290 Avenue of the Americas
New York, New York 10104
(212) 541-1080

GEORGE W. BRANDT
LYONS, BRANDT, COOK & HIRAMATSU
1800 Davis Pacific Center
841 Bishop Street
Honolulu, Hawaii 96813
(808) 524-7030

Attorneys for Petitioners
Dead Sea Bromine Co. Ltd.
and Bromine Compounds Limited